APPEAL NO. 93131

On September 11, 1992, after three continuances, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, on reversal and remand from the Appeals Panel. The claimant, (Mr B), who is the appellant in this case, had sustained a compensable injury to his back on March 9, 1991. The Appeals Panel, in Decision No. 92021, decided March 11, 1992, reversed and remanded the case for consideration and further development of evidence on whether revenues paid to the claimant, as a sole proprietor, were wages, and whether the claimant was an employee when such revenues were received. The hearing officer determined that claimant had received some amounts prior to his injury which qualified as wage. The hearing officer further determined that the claimant had disability, as that term is defined in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03(16) (Vernon Supp. 1993) (1989 Act), for the period from March 9, 1991 through October 3, 1991 (the date his doctor gave him a full release to work). The hearing officer further determined that the amount of weekly income benefits due were $64.00 per week, because the claimant was a volunteer fireman for (employer), a political subdivision within the meaning of Article 8309h, Sec. 1(2).

The claimant has appealed for two main reasons: first, that the hearing decision indicated that the claimant drew $400.00 per month, rather than $400.00 per week, from his sole proprietorship, and second, that newly discovered evidence indicates that the claimant worked for the volunteer fire department for compensation. The sole unverified explanation for the belated presentation of these documents, which are dated both before and after the claimant's injury, is that claimant had forgotten them due to pain medication and drugs. The carrier responds that the Commission should not consider new evidence produced at this late date, which reasonably could have been earlier produced.

DECISION

We affirm the determination of the hearing officer.

The facts of the case are set forth in Texas Workers' Compensation Commission Appeal Decision No. 92021, *supra*. Additional facts were developed at the reconvened hearing on remand.

The claimant testified that he was a welder by trade, but did not weld for the volunteer fire department. He stated that the fire department did not provide food or lodging, but did provide protective equipment and pay for out-of-town training.

Claimant owned (KW), a sole proprietorship. The claimant did not work for anyone else in 1990 or 1991 other than KW. He stated that KW, when it was successful bidder, worked on welding jobs for others. The claimant stated that the bidding was based upon his usual hourly rate of $32.50 per hour. Either he or KW provided the necessary equipment for welding jobs, and that he provided, and charged for, additional materials.

The claimant stated that he had no additional employees at KW in 1990 or 1991. The claimant testified that some of KW's customers were corporations, one of which was Ramco, an oil field servicing company.

The claimant stated that KW kept an account at the bank and he withdrew approximately $400.00 a week from this account for household and other expenses. Claimant described these amounts as a "salary". However, KW did not pay claimant a check for these expenses or any salary. Claimant stated that he was still seeking medical treatment for the back injury and believed that he was unable to work.

The claimant's first point, that the decision's statement of the evidence erroneously lists $400.00 per month, rather than $400.00 per week, as the amount drawn from Key Welding, is well taken. However, this point does not amount to reversible error. The 1989 Act does not require a hearing officer to summarize the evidence. *See* Article 8308-6.34(g). Further, this point would typically be important for the calculation of the preinjury average weekly wage for purposes of determining the proper amount due. In this case, because the claimant was a volunteer fireman working for a political subdivision at the time of his injury, the weekly amount of income benefits is set by statute to be the minimum compensation benefits due. Article 8309h, Sec. 1(2).

The claimant's second point, that he has "newly discovered" evidence, cannot be considered. The evidence produced, two invoices which appear to show that KW performed two welding jobs for the Fire Department, on January 8 and March 18, 1991, were clearly available during the pendency of this matter including at least three continuances that were granted for the remand. The Appeals Panel will not consider new evidence on appeal, but is limited to the record developed in the case below. Article 8308-6.42(a); Texas Workers' Compensation Commission Appeal No. 92201, decided June 29, 1992. In any case, even if such records could not have been obtained through the exercise of reasonable diligence, it is not apparent that they would probably change the result reached in the hearing officer's decision.

The hearing officer's decision is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge